

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

# JAMES HUNT

Claimant

VS.

## WESCON PRODUCTS

Respondent

AND

**CIGNA**

Insurance Carrier

Docket No. 155,577

## ORDER

**ON** the 14th day of December, 1993, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark, dated November 17, 1993, came on before the Appeals Board for oral argument by telephone conference.

## APPEARANCES

Claimant appeared by his attorney, Randy S. Stalcup, of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs, of Wichita, Kansas. There were no other appearances.

**RECORD**

The record in this matter consists of that information as set forth in the Award of Administrative Law Judge John D. Clark dated November 17, 1993, plus the records and average weekly wage stipulation as set forth in the parties' stipulations filed on January 13, 1993, and October 10, 1993.

**STIPULATIONS**

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

**ISSUES**

The claimant has requested the review of the Award of Administrative Law Judge John D. Clark dated November 17, 1993. The sole issue addressed in this appeal is the nature and extent of claimant's disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

(1) The Appeals Board adopts the findings and conclusions of Administrative Law Judge John D. Clark as contained in his Award of November 17, 1993, except those in conflict with the findings and conclusions specifically set forth herein below.

(2) Claimant is entitled to an award of compensation from respondent for a 15.67 percent (15.67%) impairment of function to the body as a whole.

The claimant was injured on January 30, 1991, while working for the respondent. At the time of accident, claimant was lifting a bucket of plastic pellets weighing approximately 35 pounds when he experienced severe pain in his neck.

Dr. Stein, a board certified neurosurgeon, diagnosed a herniated disk and eventually performed surgery on May 3, 1991. Dr. Stein released the claimant to return to work on October 7, 1991, with a functional impairment rating of ten to fifteen percent (10-15%) to the body as a whole. Dr. Stein placed restrictions on claimant to avoid overhead work, twisting of the neck, and putting the neck in an uncomfortable position.

Dr. Stephen Ozanne, a board certified orthopedic surgeon, examined the claimant on November 20, 1991. After a course of treatment of anti-inflammatories, physical therapy, and biofeedback therapy, Dr. Ozanne believed that claimant was experiencing myofascial pain syndrome and cervical disk disease and had sustained a ten percent (10%) permanent partial impairment of function to the body as a whole. Dr. Ozanne referred claimant for a functional capacity evaluation (FCE) which indicated that claimant could work in the medium category of labor and lift up to 45 pounds on an infrequent basis and lift 25 pounds or less frequently. The functional capacity evaluation also indicated that claimant could lift from floor to waist up to 35 pounds infrequently and from waist to overhead up to 12 pounds infrequently. The FCE also recommended that claimant avoid sustained overhead reach and that caution be exercised in returning him to work that would require repetitive motions such as turning the head and reaching above shoulder height. Dr. Ozanne adopts the findings of the FCE as his restrictions.

On May 12, 1992, the claimant was examined by Dr. Daniel Zimmerman at the request of claimant's attorney for purposes of providing an impairment rating and work

restrictions. Although Dr. Zimmerman is not board certified in orthopedic surgery or neurosurgery, he has extensive experience in the evaluation of physical impairment as he is the District Medical Director for the Department of Labor Office of Workers Compensation and regularly deals with work injuries of Federal employees. Also, Dr. Zimmerman is Senior Medical Consultant for the Social Security Administration and reviews decisions rendered by other physicians and administrative personnel pertaining to claims for social security disability benefits. In these positions, Dr. Zimmerman reviews other physicians' reports to ensure they correctly use the AMA Guides to assess impairment and has taught other physicians how to use the guides. Dr. Zimmerman performed a thorough evaluation and found that claimant had sustained a 27 percent (27%) impairment of function to the body as a whole as a result of his work related injury. Dr. Zimmerman believes that claimant should lift no more than 20 pounds on an occasional basis and ten pounds on a frequent basis, and should avoid frequent flexion and extension of the cervical spine.

Based upon the medical opinions provided, claimant's impairment of function rating lies somewhere between 10 and 27 percent (10-27%).

All three physicians have equally impressive credentials. Therefore, the Appeals Board, in this instance, finds that the physicians' ratings should be given equal weight as did the Administrative Law Judge. The Appeals Board adopts the finding of Administrative Law Judge John D. Clark in that claimant has experienced a 15.67 percent (15.67%) impairment of function to the body as a whole.

(3) Claimant is entitled to permanent partial general disability benefits based upon his impairment of function rating of 15.67 percent (15.67%).

Claimant has returned to work for the respondent and is now earning more than at the time of accident. In his current position, claimant operates an Artoz machine cutter as it requires less strength and he can stay within his permanent restrictions and limitations. Claimant has retained the same job title that he had at the time of his injury.

K.S.A. 44-510e(a) provides that there shall be a presumption of no work disability if the claimant engages in any work for wages comparable to the average gross weekly wage that he was earning at the time of his injury. The Appeals Board finds that claimant has not overcome this presumption. Although each case is to be decided on its own facts, three important factors the Appeals Board considered are: 1) Claimant worked for the respondent and its predecessor for approximately 13 years before his work related injury; 2) respondent was able to provide claimant with other work within his job classification; and 3) there appears to be no reason claimant cannot continue in his present position into the foreseeable future.

A primary goal of the legislature when it revamped the Workers Compensation Act in 1987 was to encourage employers to return their employees to work at a comparable wage. When the employer does that, it receives the benefit of the presumption of no work disability. In the case at hand, this presumption has not been overcome. The Appeals Board is mindful that claimant's labor market expert testified that claimant has fewer positions available to him in the open labor market due to his work related accident. However, the same expert admits that claimant's ability to earn a comparable wage has not been reduced because of the work related injury as a result of the wages paid in those fewer positions. Should claimant's status with the respondent change, claimant is entitled to request review and modification of his award.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of this Appeals Board that the Award of Administrative Law Judge John D. Clark, dated November 17, 1993, is hereby affirmed in all respects, and the Appeals Board hereby adopts the Award as if more fully set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Randy S. Stalcup, 2831 East Central, Wichita, Kansas 672214  
Douglas C. Hobbs, 600 Epic Center, 301 North Main, Wichita, Kansas 67202  
John D. Clark, Administrative Law Judge  
George Gomez, Director